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No. 93-1804

In The

Supreme Court of the United States

October Term, 1993

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

v.

RACHEL HOLLAND, by and through her guardian ad litem, ROBERT HOLLAND, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The state respondents contend that there are no issues appropriate for review.

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STATEMENT OF THE CASE

Respondents adopt the Ninth Circuit's statement of "Facts and Prior Proceedings", Petition, pages 10a through 16a.

SUMMARY OF THE ARGUMENTS

The petition, herein, is not about a split in the circuits. Rather, it is a factual dispute.

Rachel Holland, the subject of this dispute, is a child with an I.Q. of 44, entitled to receive special education and related services under the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* Based upon predictions about Rachel's I.Q. obtained from standardized testing, petitioner's witnesses testified that Rachel's ability to be mainstreamed and to keep pace with regular education pupils, to generalize her learning experiences, and to benefit from the modeling of her regular classmates was doubtful. *Fortunately* for Rachel and many pupils like her, the IDEA requires an analysis beyond standardized test results to determine a pupil's unique needs and abilities. Unfortunately for petitioner, the IDEA does not support its reliance upon generalized predictions about pupils that are based solely upon the nature of the pupils' disabilities.

The Ninth Circuit and the district court, after reviewing the petitioner's I.Q.-driven testimony and predictions, concluded that Rachel's fact-based performance contradicted generalized assumptions about her retardation. Even assuming, for the sake of argument, that there

is a split among the circuits on how to determine the need for mainstreaming, under any test the result would be the same – Rachel demonstrated that she can benefit from mainstreaming.

Masking this factual dispute, petitioner misstates the holdings below and the law to create a split where none exists. The petition must, therefore, be denied.

REASONS FOR DENYING THE WRIT

I

PETITIONER CREATES A SPLIT WHERE NONE EXISTS

A "three-way split among the circuits" is nothing more than an artifact of petitioner's selective reading of the cases and its distorted briefing. The Ninth Circuit's decision does *not* acknowledge a new balancing test that departs from already divergent tests. The Ninth Circuit merely acknowledged that it had not set a standard for its districts and approved a test that "employed factors found in both lines of cases." (Petition, page 20a.)

Petitioner's simplistic, black-letter-law recitation of the so-called tests employed by the Fifth, Sixth and Ninth Circuits[1] masks the striking similarities among the analyses employed to decide each of the factually distinct

[1] The so-called divergent tests are recited on pages 11 and 12 of the petition for writ of certiorari.

mainstreaming cases. That each circuit may have emphasized one factor over another is not indicative of divergent tests, but merely a natural result of the uniqueness of each pupil involved, the differing facts, and the differing concerns of the parties.

In accordance with the United States Supreme Court's definition of "appropriate education" in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), each of the circuits looked at the educational benefits to the disabled pupil. *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983) ["The proper inquiry is whether a proposed placement is appropriate under the Act."]; *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1047 (5th Cir. 1989) ["Thus, the decision whether to mainstream a child must include an inquiry into whether the student will gain any educational benefit from regular education."] Adopting the district court's analysis, the Ninth Circuit also started with a determination of the educational benefit to Rachel.

But each of the circuits recognized that the *Rowley* inquiry of educational benefit is insufficient when addressing the issue of mainstreaming. Acknowledging that "appropriate" and "least restrictive environment" (i.e. "mainstreaming") are separate and distinct entitlements of the IDEA, and that Congress placed equal emphasis on both, the circuits looked to a number of factors that must be considered to strike a balance between these important entitlements.

Thus, each of the circuits also addressed the non-academic benefits of mainstreaming to the individual pupil. *Roncker, supra* 700 F.2d at 1063 ["In some cases, a placement which may be considered better for academic

reasons may not be appropriate because of the failure to provide for mainstreaming."]; *Daniel R.R., supra,* 847 F.2d at 1047-1048 ["Our analysis cannot stop here, however, for educational benefits are not mainstreaming's only virtue. Rather, mainstreaming may have benefits in and of itself. For example, the language and behavior models available from non-handicapped children may be essential or helpful to the handicapped child's development."] Again, adopting the district court's analysis, the Ninth Circuit also weighed the non-educational benefits of mainstreaming, in addition to the educational benefits.

Each circuit also considered the factor of the effect of the disabled pupil on the regular classroom environment. *Roncker, supra,* 874 F.2d at 1063 ["The Act does not require mainstreaming in every case but . . . [requires that] mainstreaming be provided to the maximum extent appropriate. . . . Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing . . . that some . . . children . . . must be educated in segregated facilities . . . because the handicapped child is a disruptive force in the non-segregated setting."] *Daniel R.R., supra,* 847 F.2d at 1049 ["Finally we ask what effect the handicapped child's presence has on the regular classroom environment. . . . "] So too the Ninth Circuit considered the effects of Rachel's presence on the teacher and children in the regular class.[2]

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[2] Contrary to petitioner's assertion, the district court did not ignore the extent of curriculum modifications in the regular classroom, but stated that such had no independent significance unless it bears on the other factors, *e.g.* teacher time or cost. (Petition, page 37a.)

Finally, consideration of the resources of the school districts was also addressed by each circuit. *Roncker, supra* 700 F.2d at 1063 ["Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children. . . . Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum. . . . "]; *Daniel R.R., supra,* 847 F.2d at 1048 ["Although broad, the requirement is not limitless. States need not provide every conceivable supplementary aid or service to assist a child."][3] The Ninth Circuit, addressing the issue of cost that *was raised by petitioner,* affirmed the district court's conclusion that petitioner had failed to meet its burden of proving that Rachel's placement was unduly costly.

While the Fifth and Ninth Circuits "balanced" these various factors (*see Daniel R.R., Id.,* at 1048, "Ultimately, our task is to balance competing requirements of the [IDEA's] dual mandate. . . . "), the Sixth circuit asked lower courts to "consider" or "determine" these various factors (*see, e.g., Roncker, supra,* 700 F.2d at 1063). Whatever the description of the process used by each circuit, the Ninth Circuit's "balancing test" does not differ from the analysis employed by the others.

There being no divergent tests, the petition must be denied.

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[3] At page 1049, footnote 9, the *Daniel R.R.,* court pointed out that cost, *per se,* was not an issue in the case before it.

II

PETITIONER MISSTATES THE NINTH CIRCUIT'S VIEW OF STANDARDIZED TESTING AND MISSTATES THE LAW

Petitioner's assertion that the Ninth Circuit rejected standardized aptitude and achievement testing is specious. Neither the Ninth Circuit nor the district court eschew the value of standardized testing. Rather:

> the court noted that *the District's evidence focused on Rachel's limitations. . . .* The court concluded that the differing evaluations in large part reflected the *predisposition of the evaluators.*

Petition, pages 13a and 14a. Emphasis added.

Even a cursory reading of the district court's decision reveals that it did not criticize standardized testing. Rather, it disagreed with the use of the testing results by the witnesses for petitioner: "The [District's] witnesses do not believe that a child with Rachel's I.Q. can be effectively educated in a regular classroom." (Petition, page 39a.) Similarly, the Ninth Circuit noted, "The District has consistently taken the view that *a child with Rachel's I.Q. is too severely disabled to benefit from fulltime placement in a regular class.*" (Petition, page 18a. Emphasis added.)

Herein lies petitioner's Waterloo.

Petitioner's case was built upon assumptions about Rachel's capabilities as indicated by her measured I.Q. of 44.[4] Such controlling assumptions are in direct violation

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[4] These state respondents were and are horrified that its district, and its own diagnostic staff, would assert such

of the IDEA's prohibitions against the use of a sole criterion to determine a pupil's needs (20 U.S.C. § 1412(5)(C); 34 CFR § 300.532 (b) and (d)) and its mandate to consider a variety of factors when making placement decisions (34 CFR § 300.533). That the district court found Rachel's witnesses more credible is hardly surprising, for they relied upon tangible evidence of *Rachel's* performance and abilities, rather than on generalized predictions about how retarded children ought to perform. The Ninth Circuit appropriately left undisturbed the finding that Rachel's witnesses were more credible.

Petitioner's protestations that disabled pupils will, under the Ninth Circuit's tests, be doomed to fail repeatedly in the regular class before appropriate segregation can occur is nothing but fantasy. The Ninth Circuit's decision merely recognizes what the IDEA already requires and districts already follow in making placement decisions: That a variety of factors, including standardized testing and observation of actual performance, must be considered.

The message that a school district can properly divine from the Ninth Circuit's holding is that if one makes decisions based solely upon predictions of standardized tests, ignoring the pupil's unique needs and abilities, one violates the Act.

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assumptions after seventeen years of implementation of the IDEA, especially in view of the fact that full inclusion of severely handicapped pupils in California is common and routinely funded by the State.

Petitioner is not entitled to certiorari for its misstatement of the Ninth Circuit's ruling and the law.

III

PETITIONER MISSTATES THE IMPORTANCE THE NINTH CIRCUIT PLACED UPON SOCIALIZATION AND MINIMIZES THE EMPHASIS CONGRESS PLACED UPON MAINSTREAMING

Nowhere, as petitioner misstates, did the Ninth Circuit hold that "the disabled child's socialization is more important than her education." (Petition, page 18.) Rather, as did the Sixth Circuit in *Roncker, supra,* 700 F.2d at 1063, the district court merely noted that "the Act's requirement of integration . . . is not overcome by a showing that a special education placement is academically superior. . . . " (Petition, page 18.) The district court accurately reflected the language of 20 U.S.C. § 1412(5)(b) which requires that a child only be removed from the regular educational environment when his or her education there "cannot be achieved *satisfactorily.*" [Emphasis added.]

A "satisfactory education" is not only consistent with the language of the IDEA, but also with the Supreme Court's definition of "appropriate" in *Rowley, supra.*[5] As

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[5] As the Fifth Circuit noted: "States must tolerate educational differences; they need not perform the impossible and erase those differences. . . . [T]he Act accepts the notion that handicapped students will participate in regular education but that some of them will not benefit as much as nonhandicapped students will." *Daniel R.R., supra,* 874 F.2d at 1047.

all of the circuits have recognized, the IDEA's requirements for "appropriate education" and "mainstreaming" are equally important considerations that require a balancing, consideration, or determination of a number of factors. The social benefits as well as a satisfactory level of educational benefit are important factors.

CONCLUSION

This Court should not be persuaded by petitioner's dupery. The assertion that "[t]he IDEA itself provides a tangible and workable limit . . . " on mainstreaming (Petition, page 20), or that *Roncker* and *Daniel R.R.* identify tangible limits, whereas the Ninth Circuit's decision sets none (Petition, pages 12-13) is specious. A decision to mainstream or not is complex and fact-specific, and the focus of each analysis will vary with each child. As the Fifth Circuit stated:

> A variety of factors will inform each stage of our inquiry; the factors we consider today do not constitute an exhaustive list of factors relevant to the mainstreaming issue. Moreover, no single factor is dispositive in all cases. Rather our analysis is *an individualized, fact specific* inquiry.

Daniel R.R., supra, 874 F.2d at 1048.

Each of the circuits, including the Ninth Circuit, has focused on factors critical to the facts before them. All of the circuits' tests are strikingly similar. The divergence

among the circuits, if any there be, stems from the recognized uniqueness of each child – a recognition required by the IDEA, yet ignored by petitioner.[6]

Because there is no split among the circuits nor confusion in the law, the petition for writ of certiorari must be denied.

Respectfully submitted,

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[6] The district court, in closing, highlighted the individual nature of this decision making: "Children change, the educational demands on them change, and Rachel may change. If Rachel does not flourish under this placement in the future, then adjustments should be made. The IDEA forsees such adjustments at the annual IEP review." Petition, page 48a.